Pre-Legislative Consultation: The Key to Achieving Greater Democratic Legitimacy

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ABSTRACT
Law-making in India is a process shrouded in mystery. It is often disorganised with new laws being introduced on the fly. The absence of a proper pre-legislative consultation process makes the system superficial and unmethodical. There is a need to mandate pre-legislative public consultation which is to be implemented prior to drafting of a bill. Consultations on potential laws help ensure effectiveness and efficiency. This paper deals with how pre-legislative consultations make laws better and more inclusive. It aims to establish and reiterate the importance of pre-legislative consultation and the need for subsequent deliberation. This is done by exploring the drawbacks of the Indian law making processes, comparing legislations with and without a consultative process while further reiterating the benefits of consultation and deliberation processes. The objective of this paper is to ascertain how a more comprehensive pre-consultative policy is essential to make laws in India more inclusive and practical.

I. INTRODUCTION
The pre-legislative process is conducted by holding consultations with interested groups and people on the proposed policy or legislation, prior to drafting of the bill. This process aims to help decision makers gather policy related expertise to ensure implementation of an effective law. India lacks a legislative mandate which requires compulsory pre-legislative consultation. The country lags behind other democracies when it comes to pre-legislative consultation and deliberation processes. Although, the Ministry of Law and Justice (MOJ) had taken steps towards implementing a pre-legislative process by introducing a policy in 2014, it still failed to mandate consultation or deliberation. The Policy introduced by MOJ falls short in two aspects, first that it does not mandate consultation, and second that deliberation on the feedback received upon consultations is also not a requirement for the Government. These drawbacks, thus, end up nullifying the intended effects of the policy since they fail to serve the purpose of

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2 Dipika Jain, Law-Making by and for the People: A Case for Pre-legislative Processes in India, 41(2) STATUTE LAW REVIEW 189 (2020).
3 Id.
introducing the process of pre-legislative consultation into the system. There is a need to recognise the advantages of consultative processes. Consulting the groups that are affected by the introduction of a new law, improves the quality and effectiveness of decision-making while additionally improving public compliance with rules.\(^4\) Public engagement in the process of law making provides an opportunity to gather external views and perspectives including critical and problematic aspects of the potential law. The experience of the affected people helps ensure that laws are not unacceptable and unworkable as they are better equipped than anyone else to identify the shortcomings or potential consequences of the proposed legislation. Consequently, the legislative process would become more transparent and democratic. Absence of this step of consulting the masses might lead to fierce opposition in forms of protests and give birth to a law which is “completely divorced from the will of people”.\(^5\) However, having a process that just focusses on consultation is also not enough to make effective, secure and accessible regulations. There is an additional need for deliberation which should come after the consultation process where the Government deliberates changes to be made in accordance with the feedback received from the consulted parties.

II. BENEFITS OF PRE-LEGISLATIVE CONSULTATION PROCESSES

The absence of consultative processes steers away from characteristics of a modern administration leading to the proposed legislations remaining discretionary, unstructured and inconsistent.\(^6\) The received wisdom is that consultations should be a mandate because, as discussed above, consulting the affected will help improve the quality and effectiveness of decision-making. Consultative laws have more potential to be effective and efficient because the obstacles to laws or gaps in implementation can be discovered and resolved during the early stages.\(^7\) Additionally, they are more practical since numerous people provide their diverse views towards the proposed legislation relying on their experiences which would benefit the Government grasp the public’s position better.

Further, since the public is consulted, the proposed laws are more likely to be accepted by them since the law would reflect their values and priorities which would also prevent conflicts in the future. It builds good foundations for an informed Government that is aware and responsive towards social and legal issues, giving it the benefit of legitimacy of laws. Receiving

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\(^5\) Jain, *supra* note 2.

\(^6\) *Pre-Legislative Consultation*, 14(3) STATUTE LAW REVIEW 149 (1993).

consultations on proposed laws attune them to social realities, increasing the likelihood of their effectiveness. Dialogue forms the fulcrum of a democracy and reflecting this foundational principle on law-making would create effective, representative and collaborative legislations while bringing in greater democratic legitimacy. The use of consultative processes helps make the implementation of new laws easier and cultivates a nexus between the representatives and the represented.

Although there are many ways in which a properly functioning consultative policy can help improve the state of the law-making system of the country, the subject has its share of critics as well. The critics describe the consultation process as time-consuming and expensive, especially in cases where immediate legislative actions are required. They also argue how the absence of a consultation process does not imply lack of public opinion in the proposed laws which, in India, is usually sought when the bill is presented to the elected representative.

What the critics fail to understand is that public consultation is invaluable and essential for successful incorporation of the community’s opinions in the early stages of draft legislations. Transparency forms the foundation for an effective regulation, between the representatives and the represented, by guaranteeing accountability and increasing confidence in the legal system. To have such transparency, it is imperative to consider the public’s diverse opinions instead of just the selected few, i.e., the representatives.

According to Anthony Giddens, such ‘experiments in democracy’ fulfil certain benefits. One of them being that decision makers can ascertain where the majority support lies on an issue by relying on the input gathered from these consultations. Considering numerous opinions from stakeholders, thus becomes crucial as it allows the bill to incorporate a wider range of perspectives making it less susceptible to loopholes.

The Code of Criminal Procedure (Amendment) Bill, 2008 which was one of the eight bills that Lok Sabha passed in a hurry without consulting the lawyers who, upon introduction, protested against it, can be used as a good example to portray the importance of pre-legislative consultation processes. Here, the executive had to exercise a de facto veto because of the decision made by Lok Sabha in a haste.

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8 Jain, supra note 2.
13 Id.
legislature held consultations while formulating the law.

Another instance could be the Muslim Women (Protection of Rights on Marriage) Bill, 2017\textsuperscript{14}, which criminalises the practice of triple talaq. Here, the bill that was drafted had numerous defects in it because women’s rights activists, members of the Muslim community or criminal lawyers were not consulted during the drafting process.\textsuperscript{15} Therefore, there is a need to recognise how essential it is to have a functioning pre-legislative consultation policy and understand how it contributes to making the legal system of the country better.

III. NEED FOR POST-CONSULTATION DELIBERATIONS

Legislations with consultative processes without deliberation also fail to address the needs of the communities they purport to serve. The purpose of consultation is to gather the stakeholders’ and affected groups’ views, information, and experiences about matters, related to the proposed legislation, that are to be deliberated upon.\textsuperscript{16} It is, thus, essential to deliberate on the feedback and comments received during consultation and revise the legislation accordingly. There is a need to recognise deliberation as an integral part of the process of bill drafting. The process of deliberation is just as important as consultation because consulting the public is of no use if the comments and diverse perspectives are not incorporated or at least deliberated upon. The Government should either incorporate community responses or provide explanations for suggestions that were not included.

The combination of consultative and deliberative processes ensures an outcome which is acceptable and favourable to the broadest range of interests, reached at by taking into account public priorities and values.\textsuperscript{17} This practice further cultivates a stronger faith in the democratic model’s effectiveness and durability.\textsuperscript{18} There have been some cases like in the case of National Food Security Act, 2013 and Personal Data Protection Bill, 2018 where even though consultations were held and numerous flaws were identified, most of the recommendations made were not incorporated in the final version of the legislation introduced.\textsuperscript{19} Such cases highlight the importance of deliberation after consultation. In India there is an absence of

\begin{itemize}
\item \textsuperscript{14} The Muslim Women (Protection of Rights on Marriage) Bill (2017).
\item \textsuperscript{15} Arvind Kumar Abraham, Need of the Hour: Why Pre-Legislative Consultation will make laws better and more inclusive, THE LEAFLET (June 11, 2018) https://www.theleaflet.in/need-of-the-hour-why-pre-legislative-consultation-will-make-laws-better-and-more-inclusive/.
\item \textsuperscript{16} Jain, supra note 2.
\item \textsuperscript{17} Stuart Bell & Laurence Etherington, The Role of Consultation in Making Environmental Policy and Law, 8(2) NOTTINGHAM LAW JOURNAL 48, 51(1999).
\item \textsuperscript{18} Christopher F. Karpowitz, et al., Deliberative Democracy and Inequality: Two Cheers for Enclave Deliberation among the Disempowered, 37 POLITICS AND SOCIETY 576 (2009).
\end{itemize}
mechanisms which enable the civil society to deliberate over proposed laws prior to them being passed by legislatures.\textsuperscript{20} Therefore, there is a need to ensure that debates precede legislative enactments rather than just following them. Although deliberation is important, a democracy also requires final authorisation of decisions within reasonable time.\textsuperscript{21} Further, even though the consultative and deliberation process can be time consuming, it is essential in case of contentious and complex policies which greatly affect a group of people.

The developments of the \textit{Transgender Rights Bills} are a good example to depict the importance of deliberation. The process during drafting of the 2014 Bill\textsuperscript{22} and the later debates on the 2016 Bill\textsuperscript{23} indicated some of the routine concerns of transgender people that ought to be taken into account while law-making. But the Government failed to address the needs of their people, at multiple stages, by not reflecting upon or incorporating any of the recommendation made.\textsuperscript{24} This showed how crucial deliberation in pre-legislative process is to ensure meaningful and substantive contents of laws.

\textbf{IV. WHERE INDIA STANDS IN THE CONGLOMERATE OF DEMOCRACIES}

According to Khaitan, the Indian law-making processes suffer from two major drawbacks: firstly, bodies that are constitutionally authorised to make laws do not deliberate enough, secondly, the institutional structures, as they stand today, do not facilitate public participation when it comes to pre-legislative processes.\textsuperscript{25} The representatives are assumed to have voiced the public’s opinions comprehensively and effectively.\textsuperscript{26} This however is not the case since the representatives cannot possibly understand and hear out every individual who is affected by the proposed laws. Like in cases concerning the poor and vulnerable, who suffer systematically because they are not provided with the opportunity to participate in the drafting of the bills.\textsuperscript{27}

The Pre-Legislative Consultation Policy (PLCP), 2014 introduced by the MOJ directed the governments to publish essential elements of legislations in the public domain along with impact assessment of the potential law on the society.\textsuperscript{28} However, as discussed earlier, the policy does not, in any way, mandate the departments/Ministry to hold such public...
consultations or deliberations.\textsuperscript{29} The Government is, thus, not beholden to reflect on any of the recommendations or feedback\textsuperscript{30} they received in consultations which are also non-mandatory since the legislature has full discretion to decide whether or not to negate the suggestions received, without facing any consequences.\textsuperscript{31} India lags behind in terms of pre-legislative consultation processes when compared to other democracies like South Africa, Australia, United Kingdom, Ireland and Scotland to name a few.

Like in South Africa, the government mandates adequate consultation especially in cases where the affected groups have been discriminated against, been marginalised or anything similar, in the past, and the proposed laws directly impact them.\textsuperscript{32} In Scotland, the Government ensures that the consultation process, which is mandatory, is open and transparent to avoid discrimination against a certain group of people and to avoid depriving them of the opportunity to share their views on the proposed law.\textsuperscript{33} The other countries mentioned above have similar mandates when it comes to pre-legislative consultations prior to a proposal becoming a bill. Thus, compared to other countries referred above, which have an open and transparent process of consultations and a government that is aware of the social realities, India falls short and looks inept upon comparison. Although, it would not be fair to compare different countries because of their varying dynamics, the purpose of these comparisons is to present alternatives and hopefully open up the floor for debates regarding much needed improvement in the pre-legislative consultation policy.

In India, most legislations are not subjected to a consultative process like the \textit{Civil Liability for Nuclear Damage Act, 2010} \textsuperscript{34} which faced fierce opposition by the public who found the law to be “unconstitutional” and in direct violation of one’s right to life. This Act accurately depicts the ramifications of lack of due consideration given to community interests. Some other bills like \textit{Delhi Special Police Establishment (Amendment) Bill, 2014} and the \textit{Aadhar Bill} suffered a similar fate where they were not even subjected to any consultation process.\textsuperscript{35} Such cases portray the Government as inept and reluctant towards hosting an open conversation in hopes


\textsuperscript{30} Jain, supra note 2.


\textsuperscript{32} KS Czapanskiy & R Manjoo, \textit{The Right of Public Participation in Law-Making Process and the Role of Legislature in the Promotion of this Right}, \textit{19 DJCIL} 1 (2008).

\textsuperscript{33} Jain, supra note 2.

\textsuperscript{34} The Civil Liability for Nuclear Damage Act (2010).

\textsuperscript{35} Jain, supra note 2.
of suitably addressing the concerns of the community it governs.

The PLCP is implemented in a non-uniform manner and the legislature is not held accountable for negating the suggestions received from the consultation process.\(^{36}\) The policy mandates limited implementation as it only spans till seeking recommendations and suggestions prior to drafting of the bill and there is no mandate for deliberation on the received feedback. Some aspects of the policy have the potential of being quite problematic since in many places the term “may” is used implying that it is not a mandatory rule to be followed and rather relies entirely on the department or the Ministry’s discretion. It is understandable that consultation and deliberation in all cases might not be necessary but the terminology in the policy can be misused in cases where implementing such processes is crucial.

Therefore, there is a need for a better and more comprehensive policy which clearly sets rules and mandates pre-consultative and deliberative processes. Absence of such a policy would mean that the numerous shortcomings of the proposed laws will go unaddressed despite harsh criticisms and public suffering. The democratic legitimacy, in the eyes of the citizenry, takes a hit when Ministry’s discretion is exercised in case of legislations which greatly affect the public. India being a highly diverse country, with a Constitution that promises equality for all, makes it crucial for the legislatures to be representative and appropriately accommodative of the interests of these diverse groups while making laws.\(^{37}\) The legislative process, as it presently stands, does not necessarily require informing the public of the content of putative laws until the very last minute let alone consulting them.\(^{38}\) So such inclusivity could in actuality be very helpful in strengthening the pre-legislative consultation policy further aided by the addition of a mandate on both consultation and subsequent deliberation.

V. INSTANCES WHERE PUBLIC DISTRESS LED TO A CHANGE

An example of an Indian legislation successfully passed after a consultative process is the *Karnataka Police Bill, 2011* where wide public consultations were carried out and in the end 290 suggested amendments were successfully passed.\(^{39}\)

Another example where legislations driven by community participation and consultation have gained greater legitimacy and been more effective is the Right to Information (RTI) Act, 2005.\(^{40}\) The campaign to establish RTI started in 1990 and was a very long one. A group called

\(^{36}\) Yadav, *supra* note 31.

\(^{37}\) *Id.*

\(^{38}\) Khaitan, *supra* note 12.

\(^{39}\) Jain, *supra* note 2.

\(^{40}\) The Right to Information Act (2005).
Mazdoor Kisan Shakti Sangathan (MKSS) led a movement demanding transparency from the government after having been deprived of compensation for work they did during the famine.\footnote{Jain, supra note 2.}

In 2002, the Freedom of Information Bill was introduced and formally became the RTI Act in 2005. The act mandated a legal duty to publish all the relevant facts while formulation of important policies and to announce the decisions which affected the public.\footnote{The Right to Information Act, § 4(1)(c) (2005).}

However, despite the legal duty under s.4(1)(c) of RTI, making the content of the draft bills remained dependent on the magnanimity of the Ministry. The compulsion created by the duty under RTI was further reiterated in \textit{Venkatesh Nayak v. Chief Secretary, Govt. of Delhi} \footnote{Venkatesh Nayak v. Chief Secretary Government of NCT of Delhi, (2010) Central Information Commission (India).} where the Government was directed to develop a credible mechanism to proactively keep the public informed w.r.t draft legislations/policies/amendments be it existing or new. The RTI Act is thus viewed as a landmark legislation which highlights the role of civil society actors in the drafting of a Bill. The campaign and its following legislation are heralded as shining examples of democracy in action since the public views were able to shape the Act.

\section*{VI. Conclusion}

Pre-legislative consultation processes (PLCP) are crucial to make better, more efficient and inclusive laws. The PLCP in India falls short on many accounts and there is a need to reform the currently standing policy to ensure the presence of a mandate on consultations and subsequent deliberation. The consultation process provides a locus of guidance for the government which in turn ensures effectiveness of laws. As discussed above, if public participation is adequately facilitated and encouraged, and the resulting laws are a product of consensus and a fair process, they are more likely to be meaningful and accepted by the public. Such processes are a necessity to ensure that the country’s legal system is not unworkable and resented by the citizens.

The author contends that consultation and subsequent deliberation ought to be mandated as a part of pre-legislative mechanisms by which the affected groups and other concerned authorities can aid in the process of drafting. With the amount of protests the country faces due to aggrieved people with reference to various statutes, amendments, and, in general, rights offered to them, the necessity for implication of the proposed PLCP policy seems like a pretty evident option as the way forward. It would thus be of crucial for the Government to be open to receiving comments and criticisms on the proposed legislations with an open minded and
accepting attitude. Through allowing people to engage in the law making process of legislations that impact them the most, the democracy would also flourish. The youth and public in general should be allowed to voice their opinions and know that they are being heard and an improved PLCP policy can be a way to do that. The suggestions thus made must be used to revise the legislations in question, and if any of them are rejected, the Government should provide adequate explanation as to why such a decision was made.

India could definitely benefit greatly by establishing a process that allows public participation in law making especially in cases where such laws impact marginalised communities and fall short in offering sufficient relief to the aggrieved. Therefore, there ought to be a mandate on pre-legislative consultation and subsequent deliberation to improve the state of the Indian legal system and have a legislation that is aware of and reflects upon societal needs and realities.
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